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In the

Supreme Court of the United States

October Term, 1964
No. 362

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,

Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

and

THE UNITED STATES OF AMERICA,

Respondents.

Reply Brief of Petitioner to Brief for Clyde F. Thompson, et al.

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IN THE

Supreme Court of the United States

October Term, 1964
No. 562

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,

Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

and

THE UNITED STATES OF AMERICA,

Respondents.

Reply Brief of Petitioner to Brief for Clyde F. Thompson, et al.

The brief in opposition for Clyde F. Thompson, *et al.*, contains a statement which, without explanation, is misleading, and is inaccurate as of the present time. This statement is "The Commission determined that the representative claim did not include tribal Indians with individual tribal claims; restricted the identifiable group represented to unorganized, nontribal Indians; and sustained the right to recover in the representative claim the nontribal lands only." (p. 2 of brief for Clyde F. Thompson, *et al.*).

The opinion of the Commission, upon which the foregoing statement is based (p. 4 of the brief), is 6 Ind. Cl. Comm. 87, it is printed as Appendix A (beginning at page 13), of the brief in opposition. That decision dealt primarily with the question of whether the Indians of California, as represented by Thompson, *et al.*, had the exclusive right to present claims to the Indian Claims Commission for the taking of land in California. It was held unanimously that the Indians of California did not have such exclusive right, and that the tribal claimants were entitled to present and have determined their respective claims for the taking of their own land.

Prior to this decision, certain tribal claimants had joined with the Indians of California under stipulations which gave them the right to withdraw and to proceed with their own cases, should it be eventually determined that the Indians of California could not recover. A majority of the commission expressed the view that these stipulations were no longer proper, and that the tribal claimants in question, being the Mission Indians, the Yokiah, Yana and Shasta Tribes, should withdraw and proceed on their own (p. 22 of brief in opposition). The Mission Indians did later withdraw, 6 Ind. Cl. Comm. 666 at 669-671, but have now been readmitted.

The Yokiah, Yana and Shasta Tribes made a motion for modification of the opinion in this respect, which was unsuccessful, and, in the alternative, moved that their cases be consolidated for all purposes with that of the Indians of California. In other words, they moved to intervene on precisely the same terms as the Quechan later moved for leave to intervene. This motion was granted. 6 Ind. Cl. Comm. 674. The opinion of the

Commission is printed in the Appendix to this brief. As a result of this opinion, it is clear that there is no justification for the attempt on the part of Thompson, *et al.*, to create the impression that prior orders of the Commission have restricted the Indians of California to unorganized nontribal Indians, and that the statement hereinabove quoted is inaccurate and misleading.

It was only during the interval between the ruling of January 20, 1958, 6 Ind. Cl. Comm. 87 (Appendix A of the brief in opposition), and the ruling of October 6, 1958, 6 Ind. Cl. Comm. 674 (Appendix to this brief), a period of a little over eight months, that there was in existence a determination by the Commission that the representative claim did not include tribal Indians with individual tribal claims, and that the identifiable group in the main case was restricted to unorganized nontribal Indians.

The question presented in this case might be stated as being whether the Quechan should be penalized for not having made their motion for leave to intervene, or the equivalent, at the time when such a motion was made by the Yana, Shasta and Yokiah Tribes. Bearing on that question, these points should be noted:

None of the commission's orders ever required that the tribal claimants make an election within any certain time, or at all, as to whether they would continue with their own suits or intervene in the main action, and of course there was no notice of any such requirement. If such a requirement had been made, the tribal claimants who were in a position to prove aboriginal occupancy of a specific area in California would have been faced with a decision which would have required them to give

up a certain and known right, perhaps irrevocably, in order to obtain what would probably be in most cases, a larger recovery by participation in the main case, when it was by no means certain that recovery could be had in the main case. The government vigorously contended at all times that the decision of the Court of Claims in *Thompson v. The United States,* 122 Ct. Cls. 348, was procedural only, and that the petitioners in the main case would have to prove occupancy of specific areas by specific tribes, which all concerned knew to be an impossible task for most of California.

Under these circumstances, it is submitted that a requirement of election should not be implied, and that the Commission should have required election only by a clear and unequivocal order to that effect, made after notice to all tribal claimants. The order of October 6, 1958, 6 Ind. Cl. Comm. 674, printed *infra,* which in effect permitted intervention by the Yana, Shasta and Yokiah tribes, certainly did not require an election or set any time limit for intervention by other tribal claimants. On the contrary, it is clear, as stated on page 5 of the brief in opposition, that the opportunity was open to other groups.

To the argument, which was accepted by the Commission, and, also, presumably, by the Court of Claims, that the segregation was finally effected by the so-called A and B order, 6 Ind. Cl. Comm. 66, and the judgment of liability, 8 Ind. Cl. Comm. 1, the answer is that these orders, both of which were interlocutory, made no express requirement of election, and the procedure for consolidation, "merger", intervention or whatever it might be called, would have been just as simple after

these orders as before; and the argument that these orders imply a requirement of election is rebutted by the fact that the Pit River and Mission Indians were permitted to come in after those orders. For this purpose, the device was adopted of simply making a settlement agreement with those tribes, without the necessity of their formally intervening or moving to consolidate their cases. The consolidation was effected by the final judgment, pursuant to stipulation. The terms of consolidation are exactly the same as the terms upon which the Quechan seek to intervene, —that is to say, by the participation of members of those tribes equally in the judgment with other members of the class, and giving up the right to recover separately for their own land, the value of which will be added to the fund.

There was never any intention by the Quechan to make an election, as evidenced by the fact that they filed a brief as *amicus curiae* on the appeal in the main case, supporting the position of the Indians of California as to the measure of proof required, and asking the Court of Claims to define the terms upon which they might be permitted to intervene. Up until the time when the motion for leave to intervene was filed, the Quechan had simply taken the position that it was best for them to await developments. In this connection, it should be noted that at the time the motion for leave to intervene was filed, the settlement had not been reached, and the Quechan had no means of knowing what the amount would be. There was no opposition to the motion by either of the respondents, and it was allowed by the Court of Claims on June 21, 1963. The Quechan had every right to assume that they were then in the case, but they were nevertheless excluded from the settlement.

When the controversy was submitted to the Indian Claims Commission, the Court of Claims, on its own motion, set aside its prior order allowing the motion for leave to intervene, presumably with a view to leaving the entire matter open for the Commission's decision. If any question of timeliness is involved, we submit that the respondents have waived their rights in that regard, by their failure to object to petitioner's motion for leave to intervene.

The important point, so far as time is concerned, is that there has been no prejudice to the respondents by any delay of the petiioner. If the Quechan had intervened at the time when the Yana, Shasta and Yokiah tribes "merged" their cases with the main case, the result would have been exactly the same as it will be if the Quechan are now permitted to intervene. The Quechan would have shared equally with all others in the main case, as they now seek to do. The value of their land would have been added to the recovery in the main case, which they now offer to do, and the liability of the United States would have been precisely the same.

The brief in opposition seeks to make it appear that the question involved is one of fact. This is clearly not the case. There can be no doubt that the Quechan are in fact members of the class, Indians of California. The question is simply whether any of the technical grounds which have been urged as justification for denying them the right to intervene in the class suit, are valid. This question must be decided in the light of the fact not only that three members of the class intervened earlier, but that two other members of the class, the Pit River Indians and the Mission Indians, who had followed pre-

cisely the same course as petitioner, were permitted, in effect, to intervene, after the petitioner's motion for leave to intervene was filed.

In regard to the statement on page 9 of the brief of Thompson, *et al.,* referring to the supplemental appropriation act of October 7, 1964, 78 Stat. 1033, and stating ". . . the judgment has been paid pursuant thereto", we are advised that the money has been made available to the proper authorities for the benefit of the Indians, and is now drawing interest, but that there has not been any distribution to individual Indians. In any event, the judgment is not final so far as the Quechan are concerned, until this Court has ruled.

The question is one of general application, not only because the specific problem involves a large number of people, but because the law of class suits is in a state of confusion, particularly with regard to the settlement of such suits. It is again urged that the decision below departed from the usual course of judicial proceedings, in that it was not decided upon the merits, but was based upon technicalities which cannot be justified, with the result that there has been discrimination between members of a class in the settlement of a class suit.

Respectfully submitted,

WM. DOUGLAS SELLERS,
Attorney for Petitioner.

FULTON W. HOGE,
Of Counsel.

APPENDIX.

6 Ind. Cl. Comm. 674.

BEFORE THE INDIAN CLAIMS COMMISSION

Clyde F. Thompson, et al. (Indians of California) [Docket No. 31].

Ernest Risling, et al. (Indians of California) [Docket No. 37].

Yokiah Tribe of Indians, et al. [Docket No. 176].

Yana Tribe of Indians [Docket No. 215].

Shasta Tribe, et al. [Docket No. 333] Petitioners, v. United States of America, Defendant.

Decided: October 6, 1958

Appearances: Ernest L. Wilkinson, Reginald E. Foster, Charles Kasch, Milton Fenton, Laurence A. Schroeder, Jr., Attorneys for Petitioners.

Ralph A. Barney, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

O'Marr, Commissioner, delivered the opinion of the Commission.

On June 6, 1958, the Indians of California, Dockets Nos. 31 and 37, the Yokiah Tribe, Docket No. 176, the Yana Tribe, Docket No. 215 and the Shasta Tribe, Docket No. 333, joined in a motion requesting—

> "* * that the order of consolidation of Nov. 1953, wherein the aforesaid Dockets 176, 215 and 333 were 'consolidated for trial' with Dockets 31 and 37, be amended to provide that the aforesaid Dockets 176, 215 and 333 be consolidated in their entirety for all purposes, including judgment, with the aforesaid Dockets 31 and 37."

The defendant filed its response to such motion on June 18, 1958, stating that on certain specified conditions it did not object to the motion.

To fully understand the purpose and scope of the motion it is necessary to look at the explanation of it by the attorney representing all the parties thereto. At the argument of the motion (pp. 4124-4126) of Transcript of June 23, 1958, Docket No. 31 et al.) the attorney said about the motion:

> Now, there is a second motion filed in order to establish a fair and orderly method of procedure and that is the motion filed by Dockets Numbers 31 and 37 and Dockets Numbers 176, 215 and 333, in which we seek alternative relief.
>
> First, a granting of our motion of March 25, 1958 about which I have just been talking, holding that that is the fair and orderly way to dispose of this question. The alternative would be, and only if the Commission should rule against us on the first alternative, that these cases be consolidated for all purposes hereafter.
>
> That would mean that we would have one case proceeding, we would have consolidated five cases—six cases—and proceeding as one action, the different party plaintiffs and the procedure necessary and the substantive law applicable to the case would be just as if we had five cases merged so that we had one case with six different party plaintiffs and the applicable law would then govern the proceedings.
>
> * * *
>
> Commissioner O'Marr: Before you get into that, Mr. Barker, do these six groups that you

have just referred to, you say on your alternative plan that you would consider those cases consolidated for all purposes, including judgment. I am merely inquiring if we were to adopt your alternative plan, would there be separate judgments for each one of these four groups and the description of the lands involved?

Mr. Barker: No, your Honor. It is our view there would be one judgment. I misstated myself and I should have said five cases because Docket Number 80 was not joined in this motion.

Should they see fit to come in the scope of this motion, we have indicated we would be willing to have them come in. Actually, there would be five.

Commissioner O'Marr: I understand that we are talking about the groups in the stipulated class.

Mr. Barker: The answer to your question would be we envisage one judgment on behalf of all of the group and they would all share in that judgment as Indians of California.

The point being here that as your case proceeds, we have one consolidated case as if it were one action with the claimants, Clyde F. Thompson, et al, in Docket Number 31 and Ernest Risling, et al, in Docket Number 37, the Yokiah Tribe of Indians in 176, the Yana Tribe in Docket Number 215, and the Shasta Tribe in Docket Number 333, all with separate attorneys of record.

* * *

O'Marr: Would the lands be separately described, the boundaries of the land of the four groups?

Mr. Barker: It is our thought that the land would not be separately described in the four groups under this proceeding.

The above explanation makes it plain that it is proposed to have us consider the claims of the Yokiah, Yana, Shasta (for lands in California), and Indians of California as though they had joined in a single action and a judgment entered on that basis. Such a judgment would no doubt be a final determination of the rights of each of the parties joining in the motion for lands in California.

We see no objection to the proposed arrangement and an order will accordingly be made.

Since the above plan removes the question of the rights of the Yokiah, Yana and Shasta to assert their claims separately from the claim of the Indians of California (Dockets 31 and 37), which was the question basic to the Commission's decision of January 20, 1958, 6 Ind. Cls. Com. 93-97, there is no need for modifying that decision. Moreover, it would seem to follow that the approved consolidation constitutes an abandonment of the stipulations the three tribes made with the Indians of California, however, the effect of the consolidation is perhaps not directly involved and need not be passed upon at this time.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner